No. 15723

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSE FERRONES RIOS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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I.

Jurisdictional Statement.

The District Court had jurisdiction of the cause under Section 3231 of Title 28, United States Code.

This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.

Statement of Facts.

On February 18, 1957, Officer D. W. Beckman was assigned to the "Georgia Juvenile" Division of the Los Angeles Police Department, working narcotics [Rep. Tr. 213, 214]. For at least nine months prior to that date, he was customarily assigned to the vicinity of First and Flower Streets in Los Angeles, California. During said

time he made about 22 narcotics arrests in that particular area [Rep. Tr. 43, 44], most of them involving adults [Rep. Tr. 45]. During a four-year period previous to the above date, he had also been assigned to Fifth and Stanford in Los Angeles and had experience with narcotics traffic. In connection with his duties, he had seen heroin contained in a contraceptive and knew that container was a common method of carrying it, used by those who deal in narcotics which come in a powdered form [Rep. Tr. 77, 78]. He also knew that the general reputation of the vicinity of First and Flower Streets for activity in narcotics was bad and second only to Fifth and Stanford [Rep. Tr. 43, 214].

On the evening of February 18, 1957, he was working with Policewoman Grace near First and Flower, both in plain clothes and in a police vehicle which had no official identifying marks on the outside [Rep. Tr. 46, 47]. For approximately five minutes they observed a Yellow Cab parked in a lot next to an apartment house. The defendant came out of the apartment building, walked up and down the sidewalk and looked in several directions. He then went over to the cab and entered [Rep. Tr. 187, 188, 215; Clk. Tr. 23]. As it proceeded on through traffic it was followed by the two officers in their vehicle. A few minutes later, the taxi stopped at a red traffic light. While it was waiting for the signal to change, Officers Beckman and Grace alighted from their car and approached it, the latter walking to the driver's side. As Beckman drew up to the passenger side, he exhibited his badge in his left hand and his flashlight in his right. He also identified himself orally as a police officer to the driver and the defendant, who was sitting close to that side in the rear seat [Clk. Tr. 12; Rep. Tr. 48, 49, 188, 216].

It was about 11:00 p.m. when these things happened, but the area was well lighted with four overhead lights on each corner of the intersection [Rep. Tr. 57]. At about the time the officer was shining his flashlight on his badge, he saw the defendant reach in his right jacket pocket and then drop an object to the floor. Officer Beckman focused his light on it and saw that it appeared to be a transparent rubber contraceptive five to six inches in length and one inch in diameter, filled with light colored powder [Rep. Tr. 42, 49, 55, 56, 57, 62, 217; Clk. Tr. 12].

Immediately thereafter, the defendant pushed the right cab door out as Officer Beckman simultaneously pulled it open. Defendant alighted from the cab and the officer grasped his arm, telling him that he was under arrest "for narcotics." The policeman attempted to retrieve the contraceptive from the floor of the cab while the defendant struggled with him in an attempt to pull away. Finally, Officer Grace came around the cab and Beckman told her to pick up the "stuff" [Rep. Tr. 58, 218, 219; Clk. Tr. 13]. She then retrieved Government's Exhibit 1-A from the floor of the taxi [Rep. Tr. 91, 190, 191], and subsequently gave it to Beckman [Clk. Tr. 13, 14]. The package was later found to contain 2 ounces, 60 grains of heroin.

Shortly after Officer Grace approached the two men, defendant broke away in spite of Beckman's warnings that he was under arrest and that if he did not stop the Officer would have to shoot. There ensued an extensive chase, during which several struggles occurred. The defendant was shot once, finally subdued and then taken to a hospital [Rep. Tr. 218, to 221; Clk. Tr. 13 to 16].

Prior to and during the course of the above events, no federal officers were contacted in regard to them nor did any such officers participate in the occurrences.

The defendant was charged by the People of the State of California with a violation of Section 11500 of the California Health and Safety Code, the possession of narcotics. The case was brought to trial in the Superior Court on the record of the preliminary hearing wherein the two arresting officers had testified. A motion to suppress the evidence, consisting of the heroin, was made on behalf of defendant and granted by the Court. He was then found not guilty. In giving his decision on the motion, the Judge indicated his opinion was based upon the ground the police officer did not arrest appellant on probable cause, and, impliedly, the seizure of the evidence was therefore unlawful [Clk Tr. 38].

Thereafter, Officer Beckman conferred with his superiors in the Police Department with respect to the case and then went to the federal narcotics office about the matter [Clk. Tr. 37].

At the time the case was presented to the federal Grand Jury, neither officer Beckman nor Grace testified [Rep. Tr. 201, 247]. There was no evidence that a reporter transcribed the proceedings at all on that day.

An indictment was returned with the United States of America as plaintiff, charging the defendant

> "did * * * receive, conceal, and transport, and facilitate the concealment and transportation of a certain narcotic drug, namely: approximately 2 ounces 60 grains of heroin, * * *" [Clk. Tr. 1-A].

On July 16, 1957, the transcript of the preliminary hearing in the Superior Court and the transcript of the proceeding before that Court wherein Judge Odemar granted the motion to suppress were admitted in evidence by Judge Peirson M. Hall in a hearing before him with respect to the same motion made by appellant in the District Court. It was received only for the purposes of that proceeding [Rep. Tr. 34].

During said hearing, additional evidence with respect to the events of February 18, 1957, was received [Rep. Tr. 35]. It is clear that the primary purpose of the Government in offering this evidence was to show with more particularity what Officer Beckman saw as the "white object" was dropped by defendant onto the taxi cab floor. It had not been brought out in the preliminary proceeding exactly what the object appeared to be to the officer at that time [Clk. Tr. 12, 13].

The additional testimony was that which showed officer Beckman observed the dropping of the object to the floor of the cab and he then shined his flashlight on it. At that time, it appeared to him to be a rubber contraceptive filled with a white powdery substance, which was a common carrier used by heroin peddlers to carry the narcotic [Rep. Tr. 41, 42]. The two men opened the door simultaneously. It was after the defendant dropped what appeared to be a contraceptive filled with light powder in the cab and had alighted from the taxi that the officer grasped him by the wrist, telling him he was under arrest [Rep. Tr. 58].

III.

Argument.

As a basic premise, the federal courts have long held that where the same act or transaction constitutes an offense against both the federal and state laws, an acquittal or conviction in either the federal or state jurisdiction does not bar prosecution therefor in the other jurisdiction.

Jerome v. United States, 318 U. S. 101, 63 S. Ct. 483, cert. den. 317 U. S. 606, 63 S. Ct. 62;

Martency v. United States, 218 F. 2d 259;

Serio v. United States, 203 F. 2d 576, cert. den. 346 U. S. 887, 74 S. Ct. 144;

United States v. Farwell, 76 Fed. Supp. 35;

Jones v. Hiatt, 50 Fed. Supp. 68.

Thus, the United States District Court in this case was not bound by the prior acquittal of appellant in the Los Angeles Superior Court, whether or not it was the result of the granting of a motion to suppress the evidence. Obviously, the federal court was likewise not constrained in any way by Judge Odemar's decision on the motion itself. He was entitled to consider the matter *de novo* in the proceedings before him and to exercise independent judgment in the matter. In other words, the law is clear that there was not a "palpable deprivation of the defendant's right to Due Process in the federal courts, as guaranteed by the Fifth Amendment," by the bringing of the separate federal action based on the transaction involved in the Superior Court case.

United States v. Farwell, supra.

Counsel contends that the courts should not encourage unlawful searches and seizures by permitting use in the courts of the fruits of "such unlawful searches and seizures." Thus, his entire argument assumes that the search and seizure in this particular case were unlawful because of Judge Odemar's opinion. However, as Judge Hall stated: ". . . the United States has the right, if it desires, to have its own courts determine as a question of fact whether or not the search and seizure was or was not lawful" [Rep. Tr. 124]. Further, the proceedings before Judge Hall involved the taking of additional evidence which showed beyond any doubt that the search and seizure were lawful. In view of this fact, it is respectfully submitted that it is not necessary to resolve this appeal in the light of the "silver platter" doctrine.

Once it is established that the federal court is entitled to evalute the evidence independently and that there is sufficient proof in the record to support the District Court's holding that the search and seizure were lawful, then the inquiry in that respect has proceeded to its logical and reasonable conclusion.

The search and seizure were lawful under either one of two grounds. First, there was reasonable ground for the arrest. The general location where the defendant was first seen by the officers had a reputation in the officer's mind of being the second worst place in Los Angeles for narcotics activity. The actions of the defendant in getting into the taxicab were highly suspicious in nature. Officer Beckman also recognized immediately that the object which the defendant dropped to the floor of the cab was a rubber contraceptive filled with a light colored powder, a common receptacle used for carrying heroin by dope peddlers.

As the District Court pointed out, the taxicab waited in what appears to be a fairly disreputable negihborhood for about five minutes. The defendant came out of an apartment house, looked up and down the street and walked up the sidewalk, still looking around; then he went back to the cab and got in. No arrest took place as yet, and nothing was done to deter the defendant's movements. The officers followed the taxicab to an intersection where it stopped of its own accord, waiting for the signal to change. Officer Beckman merely walked up to the passenger side with a flashlight in one hand and exhibited his badge in the other, orally identifying himself as a policeman. Immediately thereafter the defendant reached into his jacket pocket and dropped an object to the floor. The officer shined his light on it and saw that it seemed to be a rubber contraceptive filled with the light powder. As stated above, he knew that this container was a common carrier for heroin used by those engaged in the sale of the drug in powdered form.

It was not until then, after he had observed all of these circumstances, that he endeavored to open the door. The defendant pushed it open at the same time and alighted. It was after the defendant had abandoned the contraceptive and his place in the vehicle that he was placed under arrest.

It was "highly reasonable that any conscientious police officer would be justified in reaching the conclusion that the defendant was then engaged in the commission of a felony, to wit: the transportation of narcotics . . . and he was justified in then placing the defendant under arrest" [Rep. Tr. 126, 127].

Secondly, there was actually no search here at all within the meaning of the Fourth Amendment. The defendant had "severed" himself from the object and abandoned it on the floor of a public vehicle, which he then left himself. The dropping of the object occurred before the arrest was effected, and was therefore not caused by the arrest. In a sense, it was a disclaimer by the defendant at that time of any interest in the package, which was retrieved without a search.

Assuming, *arguendo,* that the heroin had been obtained through illegal search and seizure (which, of course, the Government does not concede), the law clearly holds that it is still admissible in the federal court under certain conditions.

In *Feldman v. United States,* 322 U. S. 487, 490, 492 (1943), it was stated:

> "For more than 100 years, . . . one of the settled principles of our Constitution has been that these Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit. . . .
>
> "And so, while evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution . . . incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution."

See also:

Weeks v. United States, 232 U. S. 383, 398;

Burdeau v. McDowell, 256 U. S. 465 (1920).

This principle has been unanimously followed by the United States Courts of Appeals. In *Serio v. United*

States, 203 F. 2d 577-578, *supra,* the Court of Appeals for the Fifth Circuit held:

> "Where, as here, the search was made wholly by state officers acting solely under state law, no federal officers being present, the search was not instigated nor participated in by federal officers, and there was no assistance, cooperation or collaboration by federal officers, the evidence obtained by such search, even though the search was unauthorized, is admissible in a prosecution by the United States based upon the illegal acquisition of the article found by the search. The admission of evidence secured in such circumstances does not vitiate defendant's rights secured by the Fourth Amendment, as that Amendment operates only against the invasion of civil liberties by the United States."

The following Circuits also are in accord:

United States v. O'Brien, 174 F. 2d 341 (7 Cir. 1949);

Lotto v. United States, 157 F. 2d 623 (8 Cir. 1946); cert. den. 330 U. S. 811;

United States v. Butler, 156 F. 2d 897 (10 Cir. 1946);

United States v. Pugliese, 153 F. 2d 497 (2 Cir. 1945);

Grice v. United States, 146 F. 2d 849 (4 Cir. 1945).

It is submitted that this Honorable Court of Appeals has also always clearly upheld the general rule. In *Elwood v. Smith,* 164 F. 2d 449, 451 (9 Cir. 1947), it was held:

> "Evidence secured by a state or local officer not acting for the federal government by reason of an

> illegal search and seizure is admissible in federal courts when properly presented and is not violative of the United States Constitution . . . The Fourth Amendment is not directed towards state officials, but rather its limitations are confined to the federal government and its agency . . . Thus, the question of an infringement of the Fourth Amendment does not arise herein, the search and seizure being made by state or local officers acting independently of the federal government."

Square holdings to this effect are contained in the following cases:

Symons v. United States, 178 F. 2d 615 (9 Cir. 1949);

Ex parte Vilarino, 50 F. 2d 582 (9 Cir. 1931);

Hall v. United States, 48 F. 2d 66 (9 Cir. 1931).

The test as to whether the federal officials were working in cooperation with state officers has been laid down by the Supreme Court in the case of *Lustig v. United States,* 338 U. S. 74, 78-79:

> ". . . a search is a search by a federal officer if he had a hand in it; it is not a search by a federal officer if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

See also:

Anderson v. United States, 237 F. 2d 118 (9 Cir. 1956).

Appellant contends that the "silver platter" doctrine of non-federal participation does not apply if the evidence was illegally obtained by state officers in a state which

itself excludes illegally obtained evidence, particularly where there has been a previous decision to that effect by the state court. However, it is submitted that the above authorities, as well as those cited below, do not sustain his contention.

At least two Circuits, the Seventh and Eighth, as well as this Court, have affirmed the silver platter doctrine, although the evidentiary rule of the state wherein the search and seizure occurred is one of exclusion of illegally obtained evidence.

The Seventh Circuit case of *United States v. Stirsman,* 212 F. 2d 900, concerns a silver platter case originating with search and seizure by officers of the State of Indiana. As early as 1923, in *Flum v. State,* 193 Ind. 585 or 141 N. E. 353, in a state case concerning a liquor offense, Indiana adopted the federal rule of *Weeks v. United States.* Indiana has not changed its rule. See *Todd v. State of Indiana,* 233 Ind. 594, 596 (1954). However, in the federal *Stirsman* case, cited *supra,* the District Court denied the motion to suppress and was affirmed on appeal.

Similarly, in the Eighth Circuit case, *Jones v. United States,* 217 F. 2d 381 (Dec. 15, 1954), the Court thoroughly discusses the recent Supreme Court cases, and following them, reaffirms the doctrine of non-federal participation, as permitting receipt by the federal court of evidence admittedly unlawfully obtained by State officers in the State of Missouri. According to Wigmore, the leading Missouri case on search and seizure is *State v. Owens,* 302 Mo. 348, and 259 S. W. 100. The *Owens* case holds that in Missouri, unlawfully obtained evidence may be suppressed. The Missouri rule is un-

changed. See *State of Missouri v. Rogers,* 364 Mo. 247, 252 (1953), and Const. Mo. Art. I, Sec. 15.

The Ninth Circuit has decided the issue in accord with the Seventh and Eighth Circuits. The State of Washington, which is, of course, within the Ninth Circuit, has the federal rule excluding evidence obtained improperly. See *State v. Jarvey,* 157 Wash. 236, 228 Pac. 923 (1930), and *State v. Robbins,* 37 Wash. 2d 431, 224 P. 2d 345 (1951), for the Washington rule. In 1950, the Ninth Circuit considered a case wherein the Seattle police officers searched the defendant's room without a warrant and, two days later, turned the evidence and the case over to the federal government. The federal officers knew of the search for the first time when the case was turned over, as aforesaid. This Court held in *Parker v. United States,* 183 F. 2d 268 (9 Cir. 1950), that the evidence so obtained was admissible in federal courts because it was clear that there was no complicity by federal officials in the seizure of the evidence. See also *Symons v. United States,* 178 F. 2d 615 (9 Cir. 1949), where the defendant argued that the state officers were "agents" of the federal government when they conducted the search. The Court rejected this contention.

In *Rea v. United States,* 350 U. S. 214 (1956), cited by appellant at page 18 of his brief, the Supreme Court was dealing with an entirely different problem. It ". . . put all the constitutional questions to one side . . . We have then a case that raises not a constitutional question but one concerning our supervisory powers over federal law enforcement agencies."

Thus, the District Court properly denied all of the appellant's motions based upon the above matters.

With respect to appellant's request to examine the transcript of the grand jury, there was no evidence adduced which showed that there had been any transcript made or notes taken by a reporter of the federal grand jury proceedings on the occasion that this matter was presented to them. Further, it was established that neither Officer Beckman nor Policewoman Grace testified at that time. Therefore, appellant did not establish any basis upon which this request could have been properly granted. Certainly, under these circumstances, it was not required in the "interests of justice."

Appellant contends that he also should have been allowed to examine any written reports or records made by federal agents or oral statements by the officers to them. However, again the evidence fails to show that written records were made by federal agents of oral statements made to them by the police officers. Officer Beckman testified that he made only an oral statement to federal agents and showed them a copy of his arrest report [Rep. Tr. 68, 69]. There was no testimony that we can find which indicates his statements were written down at the federal office. Since the evidence shows that a copy of the police report containing all the details was given to the latter office, the strong inference is that his oral statements were not written down at all. Officer Grace testified that she did not make any statement in writing to them other than her collaboration with Officer Beckman in the preparation of the police report. [Rep. Tr. 196.] There is nothing to show that she accompanied him to the federal office. It is submitted that a showing must be made in the record that written reports of the statements of witnesses were made by federal agents before any complaint could be made by appellant that he

was refused access to them. Since there were no statements shown to exist for inspection, appellant's request was again properly denied.

With respect to the written police report prepared by the officers, copies of which were in the U. S. Narcotics Bureau files, it should be noted that the entire report was given to appellant, with the exception of one short paragraph dealing with the statements of another witness to the police officer [Rep. Tr. 98].

In a well considered analysis of the *Jencks* case, 353 U. S. 657 [Clk. Tr. 52-60] Judge Hall, in this case and two others consolidated for opinion, held that the motions in all three cases *misconceive* that Supreme Court decision. He held that it was clear from a careful reading of the opinion that it does not give an "unlimited hunting license to the defendant for the Government's witnesses, or an unlimited right to prospect, at will, * * *". Without repeating all of the details of his holding, with which this Court is undoubtedly familiar, we wish to emphasize that under it the defendant is logically only entitled to the exact words which the witness has used, "That is to say, if he has made a signed written statement, * * * if he has made a statement which was dictated to a stenographer and he admits that it was his statement * * * or if the statement was recorded on any kind of recording apparatus * * *." The Court went on to state that grand jury testimony is included, *if* he is shown to have testified and *if* it has been recorded. (Emphasis supplied.)

Judge Hall also held that the defendant is not entitled to see a report "touching events, activities or persons concerning which the witness has not testified. If there is set forth what some other person has told the witness,

such matter is hearsay and is not admissible in evidence, and the defendant is not entitled to see such portion * * *."

The Court then discussed at considerable length the method of determining relevancy, considering that the "Supreme Court purported to disapprove the practice of producing documents for the inspection of the Judge before being shown to the accused." The gist of his holding in that respect is that: "It is the historic function of the Judge to make decisions as to whether or not a document, or any other evidence, is relevant, or material, or competent."

"What a dream for criminals it would be," he said, *"in addition to those protections,* for them to have all the records of law enforcement agencies to paw through in the hope that something might turn up, or to warn their friends, or to influence or frighten witnesses, or to suppress evidence which has been obtained by the Government, in many instances at the risk of an officer's life." (Emphasis supplied.)

The Government believes that the comprehensive Senate report on the new Public Law 85-269; 71 Stat. 595 (sometimes referred to as a means of identification as the "Jencks' law"), will be of great interest to this Court in connection with the points raised on appeal. The text of the law, as well as the report, are contained in the "1957 U. S. Code Congressional and Administrative News", No. 14, September 20, 1957, at pages 2949 and 3215 to 3224.

It is stated therein that the objective included *interpreting* the opinion handed down by the Supreme Court of the United States on June 3, 1957, in the case of *Clinton E. Jencks, petitioner v. United States of America.*

It was said that the legislation "will also be effective in correcting wide-spread misinterpretations and popular misunderstandings of the opinion in the *Jencks* case, many instances of which have been revealed to the committee since the decision was handed down."

In formulating the legislation along the lines of Judge Hall's decision in this case, the committee emphasized that "The proposed legislation is not designed to nullify, or to curb, or to limit the decision of the Supreme Court insofar as due process is concerned." However, it had realized that "misapplication of the Jencks doctrine can mean an irretrievable loss to the Government's case."

After discussing thoroughly the aspects of the problems which are at issue herein, the report indicated that "Although there is language in the Jencks opinion which, standing alone, might have led a lower court to a misapprehension of the meaning of the decision, the committee does not believe, after studying the decision very carefully, that a defendant would be entitled under the decision in the *Jencks* case to rove at will through Government files."

In other words, the gist of the report is that the new law is the proper interpretation of the Supreme Court opinion, occasioned by "widespread interpretations and popular misunderstandings" (of which the decision below by Judge Hall was not one). It was definitely not a change intended to "nullify" or "curb" the *Jencks* decision.

It is respectfully submitted that the above report shows a correct interpretation of the case and should be of persuasive interest to this Court in affirming the judgment of the trial court.

Counsel for appellant mentions in his brief at pages 22 and 23 a colloquy between Court and counsel with respect to certain questions allegedly asked for the purpose of impeachment. It is clear that the Court as entitled to comment on the evidence and it is felt that his remarks should be treated as properly made on that basis.

IV.
Conclusion.

It is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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